LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.

DAVID A. FORKNER
(202) 434-5316
dforkner@wc.com

This matter has been reassigned to me. Please review and comply with my Individual Practices. In connection therewith, I am extending Defendant's time to respond to the Complaint to 5/12/20. Defendants' Rule 4(C)(ii) letters are due to Plaintiff by 4/28/20, and Plaintiff's responses thereto are due 5/5/20. In the event Defendants still wish to file a motion to dismiss, pre-motion letters in accordance with Rule 2(C) are due by 5/12/20, Plaintiff's response thereto is due 5/19/20, and the Court will thereafter schedule a pre-motion conference.

SO ORDERED.

Philip M. Halpern
United States District Judge

Dated: New York, New York
April 21, 2020

VIA ECF

The Hon. Kenneth M. Karas, U.S
The Hon. Charles L. Brieant Jr.
Federal Building and United Stat
300 Quarropas St.
White Plains, NY 10601-4150

Re: *Richardson v. Mars, Incorporated*, Case 7:19-cv-10860-KMK

Dear Judge Karas:

We write on behalf of Mars, Incorporated ("Mars") to request a pre-motion conference to file a motion to dismiss. Plaintiff alleges that, despite being labeled as being made with "vanilla reduced fat ice cream,' "M&M's® bars," are made with "non-vanilla flavors." Dkt. 1 ¶ 67. Plaintiff purports to bring claims for injunctive and monetary relief (1) under New York General Business Law "and Consumer Protection Statutes of Other States and Territories,"; (2) for negligent misrepresentation; (3) for breach of express warranty, Magnusson Moss warranty, and implied warranty of merchantability; (4) for fraud, and (6) for unjust enrichment. *Id.* ¶¶ 134-159. These claims are defective.

Plaintiff sued the wrong company. We have informed Plaintiff's counsel in writing that Mars is the wrong party. "M&M's® bars" are distributed by Mars Wrigley Confectionary LLC ("Mars Wrigley"), as confirmed by the packaging depicted in paragraph 3 of the Complaint. *See id.* ¶ 3 (second photo); 21 C.F.R. § 101(a) ("The label of a food in packaged form shall specify conspicuously the name and place of business of the manufacturer, packer, or distributor."); *2002 Lawrence R. Buchalter AK Tr. v. Phila. Fin. Life Assurance Co.*, 96 F. Supp. 3d 182, 199 (S.D.N.Y. 2015) (Courts disregard allegations that contradict documentary evidence).[1]

[1] Plaintiff's counsel has repurposed the same allegations in dozens of vanilla lawsuits, including claims against Mars Wrigley filed in the Eastern District of New York involving Dove Bars® and Dove Bar® Minis. *See Garadi et al v. Mars Wrigley*, 1:19-cv-03209-RJD-ST. Judge Raymond J. Dearie has invited Mars Wrigley file its motion to dismiss. *See* Minute Entry (Jan. 14, 2020).

Plaintiff's claims are implausible and preempted. To be clear, the vanilla flavor added to M&M's® bars is certified *vanilla extract, not "non-vanilla flavors." See* 21 C.F.R. § 169.175 (defining "vanilla extract"). Plaintiff nonetheless seize upon the ingredient list, which identifies vanilla extract as "natural flavor." Dkt. 1 ¶ 68. Plaintiff argues the use of the term "natural flavor" means the vanilla flavoring is not "derived exclusively from vanilla." *Id.* ¶¶ 68-70.[2]

Plaintiff's arguments are implausible and contravene federal labeling regulations. Those regulations not only define vanilla extract, but specify how to declare it in the ingredients list: "Each of the ingredients used in the food *shall be declared on the label* as required by the applicable sections 101 and 130 of this chapter." 21 C.F.R. § 169.175(a)-(c). The referenced sections, in turn, identify vanilla extract as a "natural flavor" and state that manufacturers "*shall declare the flavor in the statement of ingredients in the following way*: . . . "natural flavor . . . may be declared as "*natural flavor*." 21 C.F.R. § 101.22(h)(1); 21 C.F.R. § 101.4(b)(1) ("[F]lavorings . . . shall be declared according to the provisions of § 101.22.): 21 C.F.R. § 101.22(a)(3) (definition of natural flavor); 21 C.F.R. § 182.10 (defining "vanilla" as a natural flavoring). That Mars Wrigley complies with the controlling regulations for identifying vanilla extract cannot plausibly suggest the absence of the ingredient. *See Ashcroft v. Iqbal*, 556 U.S. 662, (2009) ("[T]he plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully."). Additionally, any attempt to impose different label requirements on Mars contravenes express pre-emption provisions for food labeling. *See Casey v. Odwalla, Inc.*, 338 F. Supp. 3d 284, 296 (S.D.N.Y. 2018) ("[I]f a product's packaging does not run afoul of federal law governing food labeling, no state law claim for consumer deception will lie.").

The negligent misrepresentation claims fail. *First*, plaintiff has not pleaded "the defendant owed plaintiff a duty of care due to a special relationship." *Nelson v. MillerCoors, LLP*, 246 F. Supp. 3d 666, 679 (E.D.N.Y. 2017); *Bautista v. CytoSport, Inc.*, 223 F. Supp. 3d 182, 193 (S.D.N.Y. 2016). Plaintiff conclusory alleges that Mars owed plaintiff a duty "based on defendant's position as a trusted entity which has held itself out as having special knowledge in the production, service and/or sale of the product type." Dkt. 1 ¶ 142. But "if this alone were sufficient, a special relationship would necessarily always exist for purposes of misbranded food claims, which is not the case." *Stoltz v. Fage Dairy Processing Indus., S.A.*, 2015 WL 5579872, at *25 (E.D.N.Y. Sept. 22, 2015); *Tyman v. Pfizer*, 2017 WL 6988936, at *15 (S.D.N.Y. Dec. 27, 2017); *Kimmell v. Schaefer*, 89 N.Y.2d 257, 265, 675 N.E.2d 450, 454, 652 N.Y.S.2d 715 (1996). *Second*, the economic loss doctrine precludes plaintiff's claim. *See, e.g., Elkind v. Revlon Consumer Prods., Inc.*, 2015 WL 2344134, at *12 (E.D.N.Y. May 14, 2015); *Gordon v. Hain Celestial Group, Inc.*, 2017 WL 213815, at *1 (S.D.N.Y. Jan. 18, 2017); *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 297 (S.D.N.Y. 2015)

The express and implied warranty claims fail. *First*, Plaintiff failed to provide the requisite pre-suit notice under New York law. *See Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 143 (E.D.N.Y. 2018); *In re Frito-Lay N. Am., Inc. v. All Natural Litig.*, 2013 WL 4647512, at *27 (E.D.N.Y. Aug. 29, 2013) (same). *Second* Plaintiff does not alleged M&M's® bars are not "fit for

[2] Plaintiff alleges that product testing "would reveal or reveals the presence of non-vanilla flavors." Dkt. 1 ¶ 77. Plaintiff does not claim testing actually has been performed, and pure speculation about what testing may show is insufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009).

human consumption," as required for a breach of implied warranty claim. *See Silva v. Smucker Natural Foods, Inc.*, 2015 WL 5360022, at *11 (E.D.N.Y. Sept. 14, 2015); *Donahue v. Ferolito, Vultaggio & Sons*, 786 N.Y.S.2d 153, 155 (1st Dep't 2004); *Hohn v. S. Shore Serv., Inc.*, 529 N.Y.S.2d 129, 130 (2d Dep't. 1988); *see also Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009). Third, plaintiff does not allege the requisite privity. *See Landtek Group, Inc. v. N. Am. Specialty Flooring, Inc.*, 2016 WL 11264722, at *35 (E.D.N.Y. 2016) ("The requirement that privity be established is equally applicable to claims based upon express and implied warranty theories.") (citations omitted); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (implied warranty claims require vertical privity).

The common-law fraud claims fail. First, Plaintiff has not alleged facts that "give rise to a *strong* inference of fraudulent intent," let alone anything beyond pure speculation. *See Davis v. Yeroushalmi*, 985 F. Supp. 2d 349, 359 (E.D.N.Y. 2013) (A false statement "is not sufficient to establish fraudulent intent, nor is a defendant's 'generalized motive to satisfy consumers' desires [or] increase sales and profits.'"); *In re Lyman Good Dietary Supplements Litig.*, 17 cv 8047 (VEC), 2018 WL 3733949, at *4 (S.D.N.Y. Aug. 6, 2018) (allegations relate only to generalized motives to earn profits and, therefore, are insufficient to state a claim for fraud). Second, plaintiff has not pleaded fraud with particularity.

The unjust enrichment claims fail. First, "claims for unjust enrichment will not survive a motion to dismiss where plaintiff fails to explain how the unjust enrichment claim is not merely duplicative of other causes of action." *Nelson v. MillersCoors, LLC*, 246 F. Supp. 3d 666, 679 (E.D.N.Y. 2017); *Silva v. Smucker Nat. Foods, Inc.*, 2015 WL 5360022, at *12 (E.D.N.Y. Sept. 14, 2015); *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012). Second, unjust enrichment is "unavailable where an adequate remedy at law exists." *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V.*, 400 Fed. Appx. 611, 613 (2d Cir. 2010); *Goodrich & Pennington Mortgage Fund, Inc. v. Chase Home Fin., LLC*, 2008 WL 11338041, at *4 (S.D. Cal. Apr. 22, 2008)

Plaintiff lacks standing to seek injunctive relief. Plaintiff cannot seek a preliminary or permanent injunction requiring Mars Wrigley to modify the packaging or label of M&M's® bars. Plaintiff fails to allege a likelihood that they will be injured in the future. Rather, Plaintiff admits that (1) plaintiff would only "consider purchasing the Product again if there were assurances that [M&M's® bars] representations were no longer misleading." Dkt. 1 ¶ 125; and (2) Plaintiff is now aware of the alleged misrepresentations and would not purchase the products. Plaintiff thus fails to demonstrate a likelihood of continuing or future injury, which is necessary to confer standing to sue for injunctive relief. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016); *Holve v. McCormick & Co., Inc.*, 334 F. Supp. 3d 535, 553 (W.D.N.Y. 2018); *Atik v. Welch Foods, Inc.*, No. 15-cv-5405, 2016 WL 5678474-MKB-VMS, at *6 (E.D.N.Y. Sept. 30, 2016) (same).

We appreciate Your Honor's attention to these matters, and remain available should this Court require any additional information regarding this request.

Respectfully submitted,

/s/ David A. Forkner

cc: All counsel of record via ECF

David A. Forkner